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CHARLES ELMORE WOOLLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1942.

No. 598.

In the Matter of

The Application of the People of the State of New York by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the Lawyers Westchester Mortgage and Title Company.

A Plan of Readjustment, Modification or Reorganization of the Rights of the Holders of Mortgage Investments in a certain mortgage guaranteed by Lawyers Westchester Mortgage and Title Company, and designated as Issue No. 5-7902.

The Application for instructions as to disposition to be made of dividend payment on account of claim allowed on guaranty.

WILLIAM A. DAVIDSON, ISAAC SHENDELL, CARL
S. BRESNICK and HELEN SEGAL,

Petitioners,

against

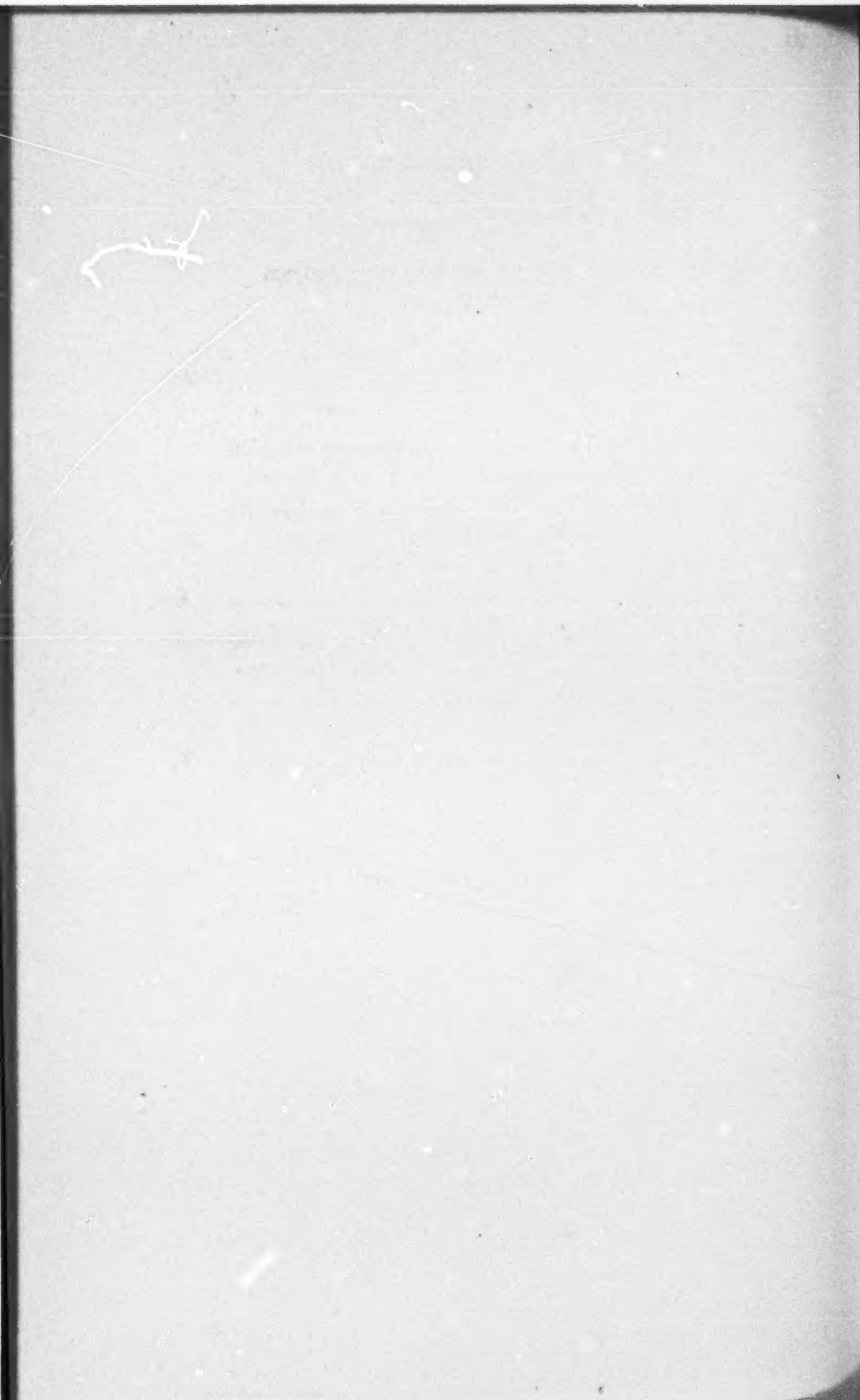
FREDERICK H. HURDMAN and others comprising the firm of
HURDMAN & CRANSTOUN,

Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI.**

MONROE J. CAHN,
WARNER PYNE,

Counsel for Respondents
Hurdman & Cranstoun.



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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioners seek to review (petition, p. 2) a decision of the New York Court of Appeals (288 N. Y. 40; R., pp. 156-167) holding that, under a trust set up to liquidate certificated mortgage investments guaranteed by an insolvent mortgage company, the claims against the company on the guaranty, contained in the certificates, had been validly made a part of the trust estate and the dividends thereon thereby made responsible for and applicable to the payment of the debts incurred by the trust estate.

JURISDICTION.

This Court is without jurisdiction herein because (1) the order sought to be reviewed is not final; (2) the application is not timely; and (3) no federal question was raised below.

(1)

The petition (p. 9) states that review is sought of a "final order and judgment of the Supreme Court of the State of New York" entered October 27, 1942 (R., p. 151).

This Court is without jurisdiction to review that order because it is not

"the final judgment or decree * * * in the highest court of the state in which a decision of the suit could be had."

Section 8A; Act of Feb. 13, 1925;
Ch. 229 (43 Stat. at L. 940);
28 U. S. C. A., section 350.

That order, entered on the remittitur of the New York Court of Appeals, made an adjudication pursuant to the

remittitur's direction (p. 145) "to proceed in accordance with the opinion herein" (R., pp. 144-145).

That new adjudication was made upon affidavits (R., p. 152), testimony (R., p. 152) and opinions of the Supreme Court (R., pp. 148, 152) not printed in this record despite the command of this Court's rules (Rule XXXVIII, para. 1).

That new adjudication was appealable to the Appellate Division of the New York Supreme Court and, if necessary, by permission, to the New York Court of Appeals, under sections 609 and 588 of the New York Civil Practice Act as follows:

"§ 609. Appeal from order of court in action.

An appeal may be taken to the Appellate Division of the Supreme Court from an order in an action, upon notice, made at a special term or trial term of the Supreme Court in either of the following cases:

* * * * *

3. Where it involves some part of the merits.

4. Where it affects a substantial right."

"§ 588. Jurisdiction of the Court of Appeals in civil actions and proceedings.

Appeals may be taken to the Court of Appeals in civil cases and proceedings as follows:

1. As of right from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the State or of the United States, * * *

4. From a determination of the Appellate Division of the Supreme Court in any department, other than a judgment, or order which finally determines an action or special proceeding, where the Appellate Division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals, but in such case the

appeal shall bring up for review only the question or questions so certified; and the Court of Appeals shall certify to the Appellate Division its determination upon such question or questions.

5. From a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding, but which is not appealable under subdivision one of this section, where the Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or where, in case of the refusal so to certify, an appeal is allowed by the Court of Appeals. Such an appeal shall be allowed when required in the interest of substantial justice."

(2)

The fact is, however, as appears from the petition (pp. 2, 9), that review is sought not of the order of the New York Supreme Court of October 27, 1942 but of the judgment of the Court of Appeals of April 23, 1942 (R., p. 143) upon which the Supreme Court order was based (R., p. 154).

Addressed to the Court of Appeals judgment, the application is manifestly not timely, having been made nearly eight months after that judgment.

Apparently, petitioners believe that because the New York Supreme Court made the judgment of the Court of Appeals its own, the time runs from the Supreme Court order. The error in this view has long since been settled. While the writ of this Court may run to the New York Supreme Court as the holder of the record, the review is of the Court of Appeals judgment.

Department of Banking, State of Nebraska v. Pink,
decided December 21, 1942;

Gelstin v. Hoyt, 3 Wheat. 246, 303, 335;

Atherton v. Fowler, 91 U. S. 143;

Crane Iron Co. v. Hoagland, 105 U. S. 701;

Shanks v. D. L. & W. R. R. Co., 239 U. S. 556, 557;

Hodges v. Snyder, 261 U. S. 600, 601.

(3)

The petition wholly fails to comply with Rule XII, paragraph 1 of this Court, as required by Rule XXXVIII, paragraph 2 thereof.

That no federal question was presented to the courts below by either the petitioners or any party aligned with them, quickly appears from the record. No such suggestion is contained in the petition of the trustees seeking instructions (R., pp. 15, 23). No such suggestion is contained in the affidavit of William A. Davidson, the only certificate holder who interposed an affidavit (R., p. 121).

The record contains no certificate by any court that any federal question was presented to it.

It follows that no federal question here exists which this Court may review.

Honeyman v. Hanan, 300 U. S. 14, 19-26;

McGoldrick v. Gulf Oil Corp., 309 U. S. 2;

Lynch v. State of New York, 293 U. S. 52, 54;

Purcell v. N. Y. C. R. R. Co., 296 U. S. 545;

N. Y. Ex Rel Rosevale Realty Co. v. Kleinert, 268 U. S. 646, 650;

Consolidated Turnpike Co. v. N. & O. V. R. R. Co., 228 U. S. 596, 599;

Home for Incurables v. City of New York, 187 U. S. 155, 157.

ARGUMENT.

The petition fails to set forth any federal question either in the "questions presented" or "reasons for granting the writ."

Petitioners suggest (pp. 9 to 10) six questions to be reviewed by this Court. It is immediately apparent that questions 1, 2 and 3 are not federal questions but questions for the State Court only, involving the meaning and interpretation of the Schackno Act, a state statute, with respect to which this Court is bound by the interpretation thereof given to it by the Court of Appeals.

Hotel & Restaurant E. I. Assn. v. Wisconsin E. R. Board, 315 U. S. 437;

Beal v. M. P. R. R. Corp., 312 U. S. 45, 50.

What federal questions petitioners intend to present by questions 4, 5 and 6 are not apparent since no section of the federal Constitution claimed to be violated is referred to, as indeed no such reference can be found at any point in the petition. We believe that the use of the word "unconstitutional" is altogether too indefinite to inform either this Court or respondents of the grounds of the attack. Until the claim is made sufficiently explicit, we believe that there is nothing for us to answer.

Likewise, analysis of petitioners' "Reason for Granting the Writ" (p. 10) fails to disclose any federal question.

A mere reading of reasons 1, 2 and 5 suffices to establish such lack.

What "federal constitutional question" reason 3 presents is not stated. Therein, complaint is made that an individual asset has been authorized to be used to pay debts in "frustration" of provisions of both statute and trust indenture. What statutory provision is offended is not disclosed. We read none in the Schackno Act itself. Since the same instrument,

the trust indenture, provided the exoneration and included the claim on the guaranty as part of the trust estate, such provisions are of equal validity and must be read together. The exonerating clause (R., p. 52) merely relieved the certificate holders of personal liability for the trust debts. It did not pretend to relieve the trust corpus therefrom. In fact, in the very paragraph which exonerated the certificate holders, it expressly constituted such trust corpus solely responsible therefor (R., p. 53).

Reason 4 presents no federal question since it merely argues against the interpretation of the Shackno Act given by the Court of Appeals, which, as already pointed out, this Court may not review.

CONCLUSION.

For the foregoing reasons, this application should be denied.

Respectfully submitted,

MONROE J. CAHN,
WARNER PYNE,

Counsel for Respondents
Hurdman & Cranstoun.

Dated, December 30, 1942.